Datuk Beh Kim Ling & Anor v NEP Holdings (M) Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-43–01 OF 2022
LIZA CHAN JC
17 JULY 2022

Companies and Corporations — Inspection of documents — Member of company denied access to accounts and documents — Whether director's right to inspect documents was absolute — Whether there was conflict of interest — Whether right to inspect documents under s 245 of Companies Act 2016 included right to inspect documents of subsidiaries companies — Whether company contractually obligated to provide audited financial statements to shareholder — Whether director and shareholder of company entitled to copy of inspected documents — Whether it was established that grant of right of inspection would be for purpose detrimental to interests of company — Companies Act 2016 ss 48, 245, 249, 250 & 259

The defendant had entered into a shareholder agreement ('the SA') with the second plaintiff which in effect made the second plaintiff as the shareholder of the defendant. Pursuant to the said SA, the second plaintiff had appointed the first plaintiff as one of the directors of the defendant. The dispute between the parties which led to the filing of the present originating summons ('the OS') by the plaintiffs started when the second plaintiff found out that the defendant failed to file its audited accounts for the year 2017 and onwards in breach of s 259 of the Companies Act 2016 ('the CA'). In the OS, both the first and second plaintiffs sought an order pursuant to s 245 of the CA that the defendant's accounting and other records required to be kept by the defendant be open to inspection by the plaintiffs' auditor known as Andrew Heng and the said accounting records be available for copies. The issue to be determined was whether the defendant had in resisting the first plaintiff's right of inspection shown 'clear proof' and satisfied the court 'affirmatively' that the grant of the right of inspection would be for a purpose detrimental to the interests of the company. The first plaintiff submitted that as a director, he had an absolute right to inspect the documents, records and information of the defendant's company. The second plaintiff argued that the defendant was contractually bound to furnish to the second plaintiff its accounting records including those of its subsidiaries pursuant to the expressed terms of cl 7.8.1 and 7.8.2 of the SA. In opposing the OS, the defendant submitted that allowing inspection and access was not in the best interests of the defendant and/or inspection ought to be refused because: (a) the first plaintiff, in conflict of interest, had failed to disclose his direct interest in a company known as Golden Rim Equity Sdn Bhd ('GRE') which was also the sole supplier of tea and coffee capsules to the

defendant's beverage brand known as Arissto; (b) the first plaintiff was involved in the production of counterfeited coffee capsules known as 'Erissto' and in leaking the defendant's trade secrets; and (c) the plaintiffs' application for inspection covered companies which were not parties to the OS and were no longer the subsidiaries of the defendant.

Held, allowing the OS with costs:

(1) The scope of inspection was very wide as the express wordings of s 245 of the CA contemplated that the power was available in respect of 'the accounting and other records' that would 'sufficiently explain the transactions and financial position of the company and enable true and fair profit and loss accounts and balance sheets and any documents required to be attached thereto to be prepared'. It ought to be noted that the right of a director to inspect documents was almost absolute and the onus and burden was on the company to show why it was denying inspection to a director. In the absence of clear proof to the contrary, the court would assume that the director would exercise the right of inspection for the benefit of the company (see paras 23–24).

(2) Based on the evidence, the court found that the defendant's argument regarding the first plaintiff's interest in GRE was an afterthought because the defendant had already known about the first plaintiff's interest in GRE since the year 2019. Further, it was not the duty of the court to assiduously examine the disputed affidavit evidence pertaining to this complaint. The first plaintiff's concerns over the accounts of the company were not noisome and to be swatted away for nuisance value particularly when non-filing of accounts within time and non-keeping of proper records of the company respectively attracted penal consequences to the first plaintiff under ss 259 and 245(9) of the CA (see para 25).

(3) The court found that the defendant's allegations regarding the first plaintiff's involvement in relation to the counterfeited capsules and the leak of defendant's trade secrets without more, strained credulity, and did not satisfy the court affirmatively of ulterior motive to defeat the first plaintiff's absolute right of access. The court agreed with the view of the court in the case of *Kwan Teck Hian v Insulflex Corporation Sdn Bhd* [2017] MLJU 1300 which followed the High Court in *Mageswary a/p Kannaiah v Vithylingam a/l Mayandy & Perniagaan Kilat Jaya Sdn Bhd* [2009] MLJU 202 which held that 'The fact that the plaintiff had set out a rival company does not ipso facto indicate that she would be using the accounts and books for the ulterior purpose of benefiting the company that she had set up'. Further, there was no suit filed against the plaintiffs by the defendant nor any steps taken to remove the first plaintiff as the director of the defendant. In this regard, the court was guided by the view of Slade J in *Conway and others v Petronius Clothing Co Ltd and*

others [1978] 1 All ER 185 where he stated that 'in the case where there is no reason to suppose that the director is about to be removed from office, the discretion to withhold an order for inspection will be very sparingly exercised' (see paras 26–30).

(4) As there was no local authority regarding the issue of whether the scope of s 245 of the CA on inspection of accounting and other records covered 'subsidiary companies', the court followed the approach of the Singapore Court of Appeal that the right of inspection of a company's records would include that of its subsidiaries, if the accounting documents in question were necessary to give a true and fair view of the state of the company's affairs. Further, to understand the financial position of a company, one must take into account that the scope of s 245 of the CA has a nexus with ss 249 and 250 of the CA and necessarily encompassed the company's subsidiaries. These sections expressly prescribed that the annual consolidated financial statements for a financial year of a company shall include all the subsidiaries of a company (see para 33).

(5) The court found that under cl 7.8.2 of the SA, the defendant had a contractual obligation to provide the audited financial statements to the second plaintiff and under cl 7.8.1, shall include those of the company's subsidiaries, and shall be provided on a consolidated basis. There was no acceptable reason advanced by the defendant to renege on its contractual obligations. Parties were bound by the terms of the agreement that they had entered into. Indeed, it was the court's duty to uphold bargains and not strike them down willy-nilly. The court was not swayed by the defendant's argument that the right to the defendant and its subsidiaries' documents were subject to the non-competition clause housed in cl 20 of the SA based only on the mere conjecture that the first plaintiff 'might use the information, including confidential business or proprietary information to injure or cause loss to the defendant company' (see paras 36–39).

(6) Section 245 ought to be read with s 48 of the CA, as such, the plaintiffs were entitled to the copy of the documents. In respect of the appointment of auditor, the court held that that pursuant to s 245(8) of the CA, the first plaintiff was entitled to appoint his auditor Andrew Heng to assist him in his inspection of the company's records. Further, the defendant had not objected against Mr Heng's appointment in the current application (see paras 40 & 47).

(7) On the entirety of the evidence, the court was not persuaded by the defendant that allowing inspection was inimical to the interests of the company. There was no 'real ground' that the right of inspection would be abused, and that substantial harm would be caused to the company

thereby. The possibility of abuse or misuse of the right (of inspection) did not in law afford any ground for its denial or restriction (see paras 24 & 44).

[Bahasa Malaysia summary

Defendan telah memeterai perjanjian pemegang saham ('SA') dengan plaintif kedua yang menjadikan plaintif kedua sebagai pemegang saham defendan. Berdasarkan SA tersebut, plaintif kedua telah melantik plaintif pertama sebagai salah seorang pengarah defendan. Pertikaian antara pihak yang membawa kepada pemfailan saman pemula ini ('SP') oleh plaintif-plaintif bermula apabila plaintif kedua mendapati defendan gagal memfailkan akaun terauditnya bagi tahun 2017 dan tahun-tahun yang berikutnya bertentangan dengan s 259 Akta Syarikat 2016 ('AS'). Dalam SP ini, kedua-dua plaintif pertama dan kedua memohon perintah menurut s 245 AS agar perakaunan defendan dan rekod lain yang perlu disimpan oleh defendan dibuka untuk pemeriksaan oleh juruaudit plaintif yang dikenali sebagai Andrew Heng dan agar rekod perakaunan tersebut tersedia untuk salinan. Isu yang perlu ditentukan ialah sama ada defendan telah dalam menentang hak pemeriksaan plaintif pertama menunjukkan 'keterangan yang jelas' dan memuaskan hati mahkamah 'secara afirmatif' bahawa pemberian hak pemeriksaan adalah untuk tujuan yang memudaratkan kepentingan syarikat. Plaintif pertama berhujah bahawa sebagai pengarah, dia mempunyai hak mutlak untuk memeriksa dokumen, rekod dan maklumat syarikat defendan. Plaintif kedua berhujah bahawa defendan terikat secara kontrak untuk memberikan kepada plaintif kedua rekod perakaunannya termasuk rekod-rekod perakaunan anak-anak syarikatnya menurut terma-terma yang dinyatakan dalam klausa 7.8.1 dan klausa 7.8.2 SA tersebut. Dalam menentang SP ini, defendan berhujah bahawa membenarkan pemeriksaan dan akses bukanlah untuk kepentingan terbaik defendan dan/atau permohonan pemeriksaan harus ditolak kerana: (a) plaintif pertama, dalam percanggahan kepentingan, telah gagal untuk mendedahkan kepentingannya yang jelas dalam syarikat yang dikenali sebagai Golden Rim Equity Sdn Bhd ('GRE') yang juga merupakan pembekal tunggal kapsul teh dan kopi kepada jenama minuman defendan yang dikenali sebagai Arissto; (b) plaintif pertama terlibat dalam pengeluaran kapsul kopi palsu yang dikenali sebagai 'Erissto' dan dalam membocorkan rahsia dagangan defendan; dan (c) permohonan plaintif-plaintif untuk pemeriksaan meliputi syarikat-syarikat yang bukan pihak kepada SP ini dan bukan lagi subsidiari-subsidiari defendan.

Diputuskan, membenarkan SP dengan kos:

(1) Skop pemeriksaan adalah sangat luas kerana perkataan-perkataan nyata dalam s 245 AS menetapkan bahawa kuasa tersebut tersedia berkenaan dengan 'rekod perakaunan dan rekod lain' yang akan 'secukupnya menjelaskan transaksi dan kedudukan kewangan syarikat dan

membolehkan akaun untung rugi dan kunci kira-kira yang betul dan tepat dan apa-apa dokumen yang dikehendaki untuk dilampirkan dengannya disediakan'. Perlu diingatkan bahawa hak pengarah untuk memeriksa dokumen adalah hampir mutlak dan tanggungjawab dan beban berada pada syarikat untuk menunjukkan mengapa ia menafikan pemeriksaan oleh pengarah. Sekiranya tiada keterangan sebaliknya yang jelas, mahkamah akan menganggap bahawa pengarah akan melaksanakan hak pemeriksaan untuk kepentingan syarikat (lihat perenggan 23–24).

(2) Berdasarkan keterangan, mahkamah mendapati hujah defendan berhubung kepentingan plaintif pertama dalam GRE adalah pemikiran terkemudian kerana defendan telah pun mengetahui kepentingan plaintif pertama dalam GRE sejak tahun 2019. Selanjutnya, ia bukan kewajipan mahkamah untuk memeriksa dengan teliti keterangan afidavit yang dipertikaikan berkaitan dengan aduan ini. Kebimbangan plaintif pertama terhadap akaun syarikat bukanlah sesuatu yang menjengkelkan dan perlu dibuang kerana nilai kacau ganggu terutamanya apabila kegagalan memfailkan akaun dalam masa yang ditetapkan dan kegagalan menyimpan rekod syarikat dengan betul akan mengakibatkan penalti kepada plaintif pertama di bawah ss 259 dan 245(9) AS (lihat perenggan 25).

(3) Mahkamah mendapati bahawa dakwaan defendan berhubung penglibatan plaintif pertama dengan kapsul palsu tersebut dan kebocoran rahsia dagangan defendan tidak boleh dipercayai dan tidak memuaskan hati mahkamah secara afirmatif berkenaan motif tersembunyi untuk menafikan hak mutlak plaintif pertama untuk mendapatkan akses. Mahkamah bersetuju dengan pandangan mahkamah dalam kes *Kwan Teck Hian v Insulflex Corporation Sdn Bhd* [2017] MLJU 1300 yang mengikuti Mahkamah Tinggi di dalam kes *Mageswary a/p Kannaiah v Vithylingam a/l Mayandy & Perniagaan Kilat Jaya Sdn Bhd* [2009] MLJU 202 yang memutuskan bahawa 'The fact that the plaintiff had set out a rival company does not ipso facto indicate that she would be using the accounts and books for the ulterior purpose of benefiting the company that she had set up'. Selanjutnya, tiada saman yang difailkan terhadap plaintif-plaintif oleh defendan mahupun apa-apa langkah yang diambil untuk memecat plaintif pertama sebagai pengarah defendan. Dalam hal ini, mahkamah berpandukan pandangan Slade J dalam *Conway and others v Petronius Clothing Co Ltd and others* [1978] 1 All ER 185 di mana beliau menyatakan bahawa 'in the case where there is no reason to suppose that the director is about to be removed from office, the discretion to withhold an order for inspection will be very sparingly exercised' (lihat perenggan 26–30).

(4) Memandangkan autoriti tempatan berhubung isu sama ada skop s 245

AS berkenaan dengan pemeriksaan perakaunan dan rekod lain meliputi 'syarikat-syarikat subsidiari', mahkamah mengikut pendekatan Mahkamah Rayuan Singapura bahawa hak pemeriksaan rekod syarikat adalah termasuk pemeriksaaan rekod anak-anak syarikatnya, jika dokumen-dokumen perakaunan yang dipersoalkan adalah perlu untuk memberikan pandangan yang betul dan tepat tentang keadaan hal ehwal syarikat. Selanjutnya, untuk memahami kedudukan kewangan syarikat, sesuatu pihak mesti mengambil kira bahawa skop s 245 AS mempunyai perkaitan dengan ss 249 dan 250 AS dan semestinya merangkumi subsidiari-subsidiari syarikat tersebut. Seksyen-seksyen ini dengan jelas menetapkan bahawa penyata kewangan tahunan yang disatukan untuk tahun kewangan syarikat hendaklah termasuk semua subsidiari-subsidiari sesebuah syarikat (lihat perenggan 33).

(5) Mahkamah mendapati bahawa di bawah klausa 7.8.2 SA tersebut, defendan mempunyai kewajipan kontrak untuk memberikan penyata kewangan teraudit kepada plaintif kedua dan di bawah klausa 7.8.1, penyata tersebut hendaklah termasuk penyata subsidiari-subsidiari syarikat, dan hendaklah disediakan secara disatukan. Tiada alasan yang boleh diterima yang dikemukakan oleh defendan untuk mengingkari kewajipan kontraknya. Pihak-pihak terikat dengan syarat perjanjian yang telah mereka masuki. Sesungguhnya, adalah menjadi kewajipan mahkamah untuk menguatkuasakan perjanjian dan tidak mengenepikannya sesuka hati. Mahkamah tidak terpengaruh dengan hujah defendan bahawa hak ke atas dokumen-dokumen defendan dan subsidiari-subsidiari syarikatnya tertakluk kepada klausa bukan persaingan yang terdapat dalam klausa 20 SA hanya berdasarkan andaian bahawa plaintif pertama 'mungkin menggunakan maklumat tersebut, termasuk maklumat sulit perniagaan atau maklumat proprietari untuk mencederakan atau menyebabkan kerugian kepada syarikat defendan' (lihat perenggan 36–39).

(6) Seksyen 245 hendaklah dibaca bersama s 48 AS, oleh itu, plainti-plaintif berhak mendapat salinan dokumen-dokumen tersebut. Berkenaan dengan pelantikan juruaudit, mahkamah memutuskan bahawa menurut s 245(8) AS, plaintif pertama berhak melantik juruauditnya Andrew Heng untuk membantunya dalam pemeriksaannya terhadap rekod syarikat. Tambahan pula, defendan tidak membantah pelantikan Encik Heng dalam permohonan semasa (lihat perenggan 40 & 47).

(7) Berdasarkan keseluruhan keterangan, defendan gagal meyakinkan mahkamah bahawa pembenaran pemeriksaan adalah bertentangan dengan kepentingan syarikat. Tidak ada 'alasan sebenar' bahawa hak pemeriksaan akan disalahgunakan, dan kemudaratan yang besar akan berlaku kepada syarikat. Kemungkinan penyalahgunaan atau salah guna hak (pemeriksaan) tidak memberikan apa-apa alasan untuk penafian atau

A sekatannya (lihat perenggan 24 & 44).]

Cases referred to

Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327; [1997] 1 CLJ 625, FC (refd)

B *Conway and others v Petronius Clothing Co Ltd and others* [1978] 1 All ER 185, CD (folld)

Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd [2018] 8 MLJ 394; [2018] 2 CLJ 103, HC (refd)

C *Dato' Tan Kim Hor & Ors v Tan Chong Consolidated Sdn Bhd* [2009] 2 MLJ 527, CA (refd)

Edman v Ross (1922) 22 SR (NSW) 351, SC (refd)

Genisys Intergrated Engineers Pte Ltd v UEM Genisys Sdn Bhd & Ors [2008] 6 MLJ 237, CA (refd)

D *James Theophilus Fredericks v Pelopor Dinamik Sdn Bhd* [2020] MLJU 470; [2020] 6 CLJ 266, HC (refd)

KPM Khidmat Sendirian Bhd v Tey Kim Suie [1994] 2 MLJ 627, SC (refd)

Kwan Teck Hian v Insuflex Corporation Sdn Bhd [2017] MLJU 1300; [2018] 2 CLJ 335, HC (folld)

E *Law Wai Duen & Anor v Boldwin Construction Co Ltd & Ors* [2001] 4 HKC 403; [2001] 3 HKLRD 430, CA (refd)

Mageswary a/p Kannaiah v Vithylingam a/l Mayandy & Perniagaan Kilat Jaya Sdn Bhd [2009] MLJU 202; [2009] 9 CLJ 40, HC (refd)

Michael C Solle v United Malayan Banking Corporation [1986] 1 MLJ 45, FC

F (refd)

Mirza Mohamed Tariq Beg bin Mirza HH Beg v Perunding Pakarmedia Sdn Bhd [2009] 10 CLJ 273, HC (refd)

Molomby v Whitehead & Australian Broadcasting Corp (1985) 63 ALR 282, FC (refd)

G *Mukherjee Amitava v Dystar Global Holdings (Singapore) Pte Ltd and others* [2018] 2 SLR 1054, CA (refd)

OCBC Bank (Malaysia) Bhd v Lim Hock Kok & Anor (kedua-dua berniaga sebagai rakan kongsi di dalam firma 'Ictinus Home and Building Constructions and Designs') [2017] 9 CLJ 454; [2017] MLJU 798, HC (refd)

H *Paul Nicholson lwn Faber Medi-Serve Sdn Bhd* [2002] 1 MLJ 355, HC (refd)

Petlad Turkey Red Dye Works Ltd v Dyes & Chemical Workers' Union, Petlad & Anor [1960] 2 SCR 906, SC (refd)

Soo Boon Siong @ Saw Boon Siong v Saw Fatt Seong andSoo Hock Seang (as estate representative Soo Boon Kooi@ Saw Boon Kooy (deceased)) & Ors [2008] 1

I MLJ 27; [2008] 1 CLJ 365, CA (refd)

Tan Bok Seong @ Tan Leong Tian v Sin Bee Seng & Co (Port Weld) Sdn Bhd & Ors [1995] MLJU 384; [1995] 4 CLJ 795, HC (refd)

Tneu Beh v Tanjong Kelapa Sawit Sdn Bhd & Ors and another action [1994] MLJU 366; [1995] 1 CLJ 741, HC (refd)

Tom Ming Chou v Pan Ping-Hu Antony & Ors [2009] HKCU 1660; [2009] HKCFI 1008 (refd)
Welch & Anor v Britania Industries Pte Ltd [1993] 1 SLR 673, HC (refd)
Wuu Khek Chiang George v ECRC Land Pte Ltd [1999] 3 SLR 65, CA (refd)
Wong Hon Leong David v Noorazman bin Adnan [1995] 3 MLJ 283; [1995] 4 CLJ 155, CA (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) ss 131, 167, 167(3), (6), (7)
Companies Act 1967 [SG] s 199
Companies Act 2016 ss 48, 48(3), 221, 245, 245(1), (3), (4), (8), (9), 249, 250, 259

S Sivaneindiren (with Jayne Koe, Jocelyn Teoh and Bong Lep Siong) (Cheah, Teh & Su) for the plaintiffs.
Alvin Lai Kok Wing (with Christina Chin) (Justin Voon Chooi & Wing) for the defendant.

Liza Chan JC:

INTRODUCTION

[1] By the originating summons ('OS'), the first plaintiff and the second plaintiff in their capacity as director and shareholder respectively of the defendant company ('the defendant' or 'the company'), sought an order that the company's accounting and other records required to be kept by the company be open to inspection by Andrew Heng, an approved company auditor and a partner/director of Baker Tilly Monteiro Heng PLT acting for the plaintiffs; and the said accounting records as set out in Annexure B to the OS be available for copies and/or extracts to be made by said auditor and/or his colleagues.

[2] After having read the cause papers, considered the submissions and heard oral arguments of the parties, I had allowed the OS. This judgment contains the reasons for the decision delivered on 10 June 2022.

BACKGROUND FACTS

[3] Pursuant to a subscription agreement dated 25 July 2016 entered into between the second plaintiff, the company and one Lim Chang Huat ('LCH'), the second plaintiff subscribed for a 20% stake in the company at a subscription price of RM60m. Clause 10 of the subscription agreement provided that in consideration of the second plaintiff entering into the said subscription agreement and as 'part of the inducement' for the second plaintiff

to make the investment, LCH guaranteed that the audited consolidated net profit after tax of the company for the financial year ending 30 June 2017 shall not be less than RM40m and in the event that the audited net profit after tax of the company for the financial year ending 30 June 2017 is below RM40m, LCH shall reimburse the second plaintiff for the shortfall.

[4] On the same day, the second plaintiff also entered into a shareholders' agreement dated 25 July 2016 with the company, one Lim Chee Kon ('LCK') and LCH ('the shareholders' agreement').

[5] The shareholders' agreement, inter alia, provided that:

(a) so long as the second plaintiff holds at least 5% of the ordinary shares or any other classes of shares of the company, the second plaintiff is entitled to appoint one director to the Board of Directors of the company termed as the Investor Director of the second plaintiff — cl 7.1.1;

(b) the second plaintiff will be given full access to the records, financial statements and information of the company and further the company shall deliver to the second plaintiff the documents and information set out in cl 7.8.1(a) to 7.8.1(e) of the said shareholders' agreement, in such manner as the second plaintiff may determine — cl 7.8.1; and

(c) the audited financial statements to be provided to the second plaintiff under cl 7.8.1 shall include those of the company's subsidiaries and shall be provided on a consolidated basis — cl 7.8.2.

[6] Following the shareholders' agreement, the first plaintiff was nominated by the second plaintiff and was appointed a director of the company on 25 July 2016.

[7] As at date of the OS, the second plaintiff continues to hold a 20% shareholding in the company. This translates into the second plaintiff being entitled to a board seat in the company.

[8] The first plaintiff is not involved in the day-to-day management and business operations of the company.

THE PLAINTIFFS' CASE FOR INSPECTION

[9] The second plaintiff argued that:

(a) the company is contractually bound to furnish to the second plaintiff its accounting records including those of its subsidiaries pursuant to the expressed terms of cl 7.8.1 and 7.8.2 of the shareholders' agreement; and

(b) the second plaintiff had through its previous solicitors, Messrs Radhi Azizan ('RA') by letter dated 15 April 2021 had expressed concern over the company's affairs and demanded from the company unhindered full access to the records, financial statements and information of the company. The defendant in response on 21 April 2021 acknowledged the right of the second plaintiff's nominee on the board ie the first plaintiff to access 'all documents and accounts' of the company and its subsidiaries and was willing to provide full cooperation and access, but, in breach of the shareholders' agreement, has failed and continues to fail to provide the second plaintiff the accounting and the records stipulated in cl 7.8.1 and 7.8.2 of the shareholders' agreement.

[10] It was submitted on the first plaintiff's behalf that:

(a) he has reasons to suspect that something may be amiss about the business, management and affairs of the defendant and its subsidiaries given that the defendant's plan which was discussed at Board level on 14 September 2020 and 23 December 2020 for the Arissto Group comprising of AMSB, Arissto Bakery Sdn Bhd, Arissto Retail and Distribution Sdn Bhd, Arissto International Distribution Ltd, Arissto (HK) Ltd, Arissto Holdings Pte Ltd, Arissto Singapore Pte Ltd and Arissto (UK) Ltd (indirectly owned subsidiaries of the company) to be listed on the Main Board of Bursa Malaysia Securities Bhd ('intended IPO') were held in abeyance by the defendant as the defendant failed to submit sufficient information and documentation required by AmInvestment Bank Bhd ('AmInvestment'), the sole principal advisor, book runner and underwriter of the intended IPO;

(b) the aforesaid suspicion led to the second plaintiff to seek legal advice from RA in April 2021 who discovered at that material time as at 2021, that the defendant did not file its audited accounts for the past three years or so ie for financial year ended from 2017 onwards in breach of s 259 of the Companies Act 2016 ('the CA 2016').

(c) the first plaintiff's request to inspect the accounting records is presumed to be made in the best interest of the defendant and in discharging his duties and responsibilities as a director of the defendant once he has satisfied the three requirements as set out in *Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd* [2018] 8 MLJ 394; [2018] 2 CLJ 103 and *James Theophilus Fredericks v Pelopor Dinamik Sdn Bhd* [2020] MLJU 470; [2020] 6 CLJ 266 in that:

(i) he is a director of the company;

(ii) he has sought for inspection of the accounting records through his solicitors' letter 6 December 2021. The letter informed the defendant that the first plaintiff will attend at the defendant's business address at 10.30am on 8 December 2021 to inspect and make copies of the accounting records;

(iii) his right to inspect the accounting records has been refused by the defendant as the defendant by its solicitors' letter dated 7 December 2021 informed the plaintiff's solicitors inter alia that the defendant was 'unable to grant access to and/or inspection of the documents' sought by the first plaintiff;

(iv) to date, only the defendant's audited accounts of the defendant for financial year ended 30 June 2016, for the financial periods from 1 July 2016 to 1 December 2017 and from 1 January 2018 to 30 June 2019 and the draft audited accounts of the defendant for financial year ended 30 June 2020 have been made available by the defendant. The fact that these accounts were made available is agreed upon;

(v) the draft audited accounts for the financial year ended 30 June 2020 fortified the plaintiffs' suspicion that something was amiss in the accounts, business management and affairs of the defendant and its group. It disclosed the following:

(1) more than 90% (ie RM138,377,000) of the trade receivables recorded by the defendant's group had been long outstanding for more than 90 days, out of which RM81,532,000 was outstanding for more than 365 days;

(2) 85.65% of the trade receivables were denominated in foreign currencies;

(3) the trade payables recorded by the defendant's group was only RM3,844,000 as compared to the trade receivables recorded by the defendant;

(4) approximately 83% of the trade receivables were owing from only two customers; and

(5) the cash and bank balances recorded by the defendant's group was only RM28,404,000 even though the gain from the disposal of investments in subsidiaries during the financial year ended 30 June 2019 is RM84,210,000.

[11] The first plaintiff further submitted that as a director, his right to inspect the documents, records and information of the companies is absolute, citing *Dato' Tan Kim Hor & Ors v Tan Chong Consolidated Sdn Bhd* [2009] 2 MLJ 527, *Dato' Seri Timor Shah Rafiq*; *Kwan Teck Hian v Insulflex Corporation Sdn Bhd* [2017] MLJU 1300; [2018] 2 CLJ 335 and *James Theophilus Fredericks*.

[12] Following the authorities alluded earlier, it was submitted that as the first plaintiff is a director, it is not necessary for him to provide a reason for the inspection. The first plaintiff as a director, is all the more entitled to and obliged

to inspect the accounting records to protect the interests of the defendant and its shareholders when there are suspicions on the accounts, business management and affairs of the defendant. This is simply because his failure to do so may open him to charges of breach of directors' duties, apart from the failure to keep proper records under s 245(1) of the CA 2016 which is an offence under s 245(9) of the CA 2016.

[13] Learned counsel for the plaintiffs, Mr Sivaneindiren pointed out that in the case of *Kwan Teck Hian* where similar suspicions were raised, the court took the suspicions into consideration when it granted the inspection. The court held that those suspicions are certainly matters for a director to be aware of and accountable to, and denial of access renders the director unable to perform his statutory and fiduciary functions. In the instant proceedings, learned counsel posited that the accounting records sought would, inter alia, reveal the details of the said two customers, the breakdown of the transactions with them, the arrangement and justification to continue selling to them without settlement of the long outstanding receivables and why the cash and bank balances were much lower. These matters according to learned counsel, are highly relevant to the financial wellbeing of a company and are of concern to its directors.

[14] Finally, learned counsel argued that it is for the company to show that there are ulterior motives to deny that right of inspection.

THE COMPANY'S CONTENTIONS

[15] The company did not dispute the second plaintiff's contractual rights to the accounting records but argued that the right to documents must be read with the competition clause (cl 20) of the shareholders' agreement which prohibits parties (including the second plaintiff) and its affiliates from directly or indirectly conducting or engaging or be concerned with or interested in any business in competition with the business of the defendant company. As the first plaintiff is also director of the second plaintiff, to grant access and/or right of inspection to the second plaintiff is equivalent to granting the same to the first plaintiff, 'who *might use* the information, including confidential business or proprietary information to injure or cause loss to the defendant company'. It was also contended that the second plaintiff has no right pursuant to s 245 of the CA 2016.

[16] As for the first plaintiff, the company in summary contended allowing inspection and access is not in the best interests of the company and/or inspection ought to be refused as:

(a) it was 'recently discovered' that the first plaintiff, in conflict of interest, failed to fully disclose his direct interest in Golden Rim Equity Sdn Bhd ('GRE') to the defendant:

(i) the first plaintiff is the sole shareholder and a director of GRE;

(ii) GRE is the only supplier of the company and in Malaysia for Arissto Tea Capsules which have the same dimension as the company's Arissto Coffee Capsules, and which can only be used together with the company's Arissto Coffee machines; and

(iii) such failure to disclose is a breach of the mandatory provisions of s 221 of the CA 2016.

(b) GRE refused to refund the RM2m allegedly to be the deposit paid by the company to GRE for the supply of tea capsules;

(c) the leak of trade secrets arising from the defendant's discovery of counterfeit Erissto Coffee Capsules sold in the market through one AK Koh Enterprise Sdn Bhd on Shopee which has the same or similar technical dimension as the defendant's Arissto Coffee Capsules and Arissto Tea Capsules, and the plaintiffs should not be allowed to inspect the accounting records in order to protect the interest of the defendant:

(i) the alleged counterfeit Erissto Coffee Capsule 'were likely' produced from the same mould used by GRE to produce the defendant's Arissto Capsule'; and

(ii) that GRE and/or the first plaintiff 'are *likely involved* in the production and sale of the counterfeit capsules in the market and have *likely acted in direct conflict* with the defendant's interests and in breach of his duties as the director of the defendant company'.

(d) the request to inspect and/or to take copies by the plaintiffs covers companies which are not named as parties to the present OS. Companies like NEP Holdings Hong Kong Ltd ('NHHK'), Wilco Global Ltd ('WGL') and Shenzen Diamond Trading Co Ltd (China) ('SDTCL') are no longer the subsidiaries of the defendant company:

(i) it is trite law that the holding company and its wholly owned subsidiary are separate legal entities; and

(ii) even if the second plaintiff as a shareholder is entitled to inspect the documents of the defendant's subsidiary companies, the subsidiary companies must be included as parties in the suit before any order can be made for inspection of such documents.

THE LAW ON A DIRECTOR'S RIGHT TO INSPECT DOCUMENTS

[17] Section 245 of the CA 2016:

(a) mandates every company, its directors and managers to keep accounting and other records. Section 245(1) reads:

245(1) A company, the directors and managers of a company shall — A

(a) cause to be kept the accounting and other records to sufficiently explain the transactions and financial position of the company and enable true and fair profit and loss accounts and balance sheets and any documents required to be attached thereto to be prepared; and

B

(b) cause the accounting and other records to be kept in a manner as to enable the accounting and other records to be conveniently and properly audited.

(b) prescribe that the accounts and records of the company are to be kept for seven years after the completion of the transactions to sufficiently explain the transactions and financial position. This is set out in s 245(3) which reads: C

245 Accounts to be kept

...

(3) The company shall retain the records referred to in subsection (1) for seven years after the completion of the transactions or operations to which the entries relate. D

(c) provides for a director's right of inspection as follows:

E

245(4) The records referred to in subsection (1) shall be kept at the registered office of the company or at such other place as the directors think fit, and shall at all times be open for inspection by the directors.

(d) specify that the court may order inspection of the accounting and other records by an auditor acting for a director: F

245(8) The Court may, in any particular case, order that the accounting and other records of a company be open to inspection by an approved company auditor acting for a director, subject to a written undertaking given to the Court that information acquired by the auditor during his inspection shall not be disclosed by him except to that director. G

(e) imposes a heavy fine or incarceration or to both on the company and every officer in contravention of the section:

245(9) The company and every officer who contravenes this section commit an offence and shall, on conviction, be liable to a fine not exceeding five hundred thousand ringgit or to imprisonment for a term not exceeding three years or to both. H

[18] Section 167(3), (6) and (7) of the Companies Act 1965 ('the CA 1965') are the same as s 245(4), (8) and (9) of the CA 2016 except that under s 245(9) of the CA 2016, the fine of RM5,000 or a term of imprisonment of six months or both as stated in s 167(7)of the CA 1965, was increased to a maximum fine of RM500,000 or a jail term not exceeding three years or to both. Section 167 of the CA 1965 is similar to s 199 of the Companies Act 1967, Singapore. This I

will become relevant when considering the cases decided under s 167 such as *Dato' Tan Kim Hor & Ors v Tan Chong Consolidated Sdn Bhd* [2009] 2 MLJ 527, and the Singapore case of *Wuu Khek Chiang George v ECRC Land Pte Ltd* [1999] 3 SLR 65 (CA).

RELEVANT PRINCIPLES ON THE RIGHT OF INSPECTION

[19] It is useful to begin the analysis by a restatement of the relevant principles on this subject which were set out in the leading authority of the Court of Appeal in *Dato' Tan Kim Hor & Ors v Tan Chong Consolidated Sdn Bhd* where Low Hop Bing JCA, delivering the judgment of the Court of Appeal referred to the common law and cited with approval a leading Singapore Court of Appeal authority *Wuu Khek Chiang George* in the following manner:

> [16] The relevant established principles have been succinctly stated by the Singapore Court of Appeal in *Wuu Khek Chiang George*. There, the appellant, a director of the respondent, took out an application under s 199 of the Singapore Companies Act (equipollent to our s 167) for an order requiring the respondent to inspect its accounting and financial records. The High Court judge dismissed the application. After reviewing a long line of authorities, the Court of Appeal allowed the appellant's appeal and held, inter alia, that:
>
> (a) the right of a director of a company to inspect its accounting and other records is *a right existing at common law* and is recognised in s 199 of the Companies Act. Such right is a concomitant of the fiduciary duties of good faith, care, skill and diligence which the director owes to the company, and as such, like other rights and powers, must be exercised for the benefit of the company. The obligation of the company to allow inspection by its director is mandatory;
>
> (b) *this right has been described as being 'absolute'. A director is prima facie entitled to inspection and is not required to demonstrate any particular ground or 'need to know' as a basis* : *Molomby*. So long as the right is exercised for the proper performance of the director's duties to the company and not with a view to causing any detriment to the company, it is in that sense 'absolute': see eg, *Dato Aw Kow v Haw Par Bros (Pte) Ltd* [1972] 2 MLJ 225; [1972–1974] SLR 391 , *Haw Par Brothers v Dato Aw Kow* [1973] 2 MLJ 169; [1972–1974] SLR 183; *Leong Sun Wing v Wah Hup Engineering Works Sdn Bhd (No 2)* [1977] CSLR VII [1003]; *MolombyWelch & Anor v Britannia Industries Pte Ltd* [1993] 1 SLR 673; *Edman v Ross* (1922) 22 SR (NSW) 351 and *Conway & Ors v Petronius Clothing Co Ltd & Ors* [1978] 1 All ER 185; [1978] 1 WLR 72
>
> (c) *there is no residual discretion in the court to refuse inspection*. Where the court bars a director from exercising his right of inspection, it is not in fact exercising a residual discretion, but is in such an event satisfied on the basis of the evidence before it that the director's intention is to use the information obtained for ulterior purposes such as with a view to causing detriment to the company and that the director is thus abusing the

confidence reposed in him; *Berlei Hestia (NZ) Ltd v Fernyhough* [1980] 2 NZLR 150 per Mahon J;

(d) *the right of a director to inspect the books and records of the company flows from his office as a director and enables him to perform his duties as a director*. The corollary of this is that the right will be lost where it is exercised not to advance the interests of the company but some other ulterior purpose to injure the company: *Edman v Ross*, *Molomby*; *Deluge Holdings Pty Ltd & Anor v Bowlay & Ors* [1991] 9 ACLC 1486 *Welch & Anor; Re Geneva Finance Ltd (Receiver and Manager Appointed)* (1992) 10 ACLC 668 and *Paul Nicholson lwn Faber Medi-Serve Sdn Bhd dan lain-lain* [2002] 1 MLJ 355.

...

[28] In our view, s 167(6) is intended to facilitate and liberalise, and is not meant to impede, the right of inspection. *Indeed, almost unbridled powers are conferred upon the court to give effect to the directors' right of inspection*. Clearly, it is within the powers of the court to allow the plaintiffs to furnish a fresh undertaking by the auditor in terms as required by the court, by addressing it to the court and by deleting therefrom the words relating to the appointed servants/agents. This is especially so after the learned judge had arrived at a specific decision that the defendant had, in the first instance, failed to discharge its burden to show that the plaintiffs' inspection would result in any detriment to the interests of the defendant. That is a reaffirmation that *the right of inspection by the plaintiffs as directors of the defendants pursuant to s 167(6) is 'absolute'*. (Emphasis added.)

[20] In *Wuu Khek Chiang George* LP Thean JA held:

[33] *The right of a director to inspect the books and records of the company flows from his office as a director and enables him to perform his duties as a director, including the duty to ensure that the company complies with the requirements as to accounts set out in the Companies Act: see s 20(1) of the Act*. Such right is an important one, as the books and records of a company are a primary, and sometimes the only, source of information as to the state of affairs of a company. *It follows that unless a director has access to these sources of information, he would be severely inhibited in the proper performance of his duties*. So long, therefore, as such right is exercised for that purpose and not with a view to causing any detriment to the company, the right to inspect is 'absolute'. In this sense and to that extent, the right may be termed 'absolute'. The corollary of this is that the right will be lost where it is exercised not to advance the interests of the company but for some ulterior purpose or to injure the company: *Edman v Ross* at p 361, *Molomby v Whitehead* at p 292, *Deluge Holdings Pty Ltd & Anor v Bowlay & Ors* (1991) 9 ACLC 1 *486*, 1, 488 and *Re Geneva Finance Ltd (Receiver and Manager Appointed)* (1992) 10 ACLC 668 pp 675–676.

Burden of proof

[34] *The onus of establishing that the right is being, or will be, exercised for an improper purpose lies on the person who asserts it*: per Isaacs J in *Australian Metropolitan Life Assurance Co Ltd v Ure & Ors* (1923) 33 CLR 199 219. *There is no burden on a director to show any particular reason for his request for inspection — this will ordinarily be assumed: see Molomby v Whitehead* at p 293. It is for those who oppose the

director's right to inspect to show 'clear proof' and to satisfy the court 'affirmatively' that the grant of the right of inspection would be for the purpose which would be detrimental to the interests of the company. *There must be a 'real ground' that the right would be abused and that substantial harm would be caused to the company thereby*. (Emphasis added.)

[21] In *Dato' Tan Kim Hor*, Low Hop Bing JCA cited the above two passages with approval as follows:

BURDEN OF PROOF

[9] It is settled law that the defendant, having resisted the plaintiffs' right to inspect the accounting and other records of the defendant, bears the burden of proving that the plaintiffs' right is being, or will be, exercised for an improper purpose: *Australian Metropolitan Life Assurance Co Ltd v Ure & Ors* (1923) 33 CLR 199, per Isaacs J; and *Wuu Khek Chiang George v ECRC Land Pte Ltd* [1999] 3 SLR 65 (CA) per LP Thean JA.

[10] *It is for the defendant to show 'clear proof'* and to *satisfy the court 'affirmatively' that the grant of the right of inspection would be for a purpose detrimental to the interests of the company. There must be a 'real ground' that the right would be abused and that substantial harm would be caused to the company thereby*: *Wuu Khek Chiang George*.

[22] In *Paul Nicholson lwn Faber Medi-Serve Sdn Bhd* [2002] 1 MLJ 355 at pp 360–361, the court held that a director is entitled to know everything that is happening in the company and such absolute right cannot be seized away by anyone:

Pada pendapat saya, *hak pengarah untuk akses kepada dokumen syarikat adalah hak mandatori yang diperuntukkan oleh undang-undang (s 167 Akta tersebut) dan tiada sesiapa pun boleh melucutkan hak tersebut malan oleh mahkamah sendiri, melainkan di luar peruntukan s 167 tersebut. Hak statutory tersebut diperuntukan supaya tanggungjawab yang dipikul oleh seseorang pengarah sesebuah syarikat dapat dilaksnaakan dengan telus, adil dan saksama bagi manfaat syarikat khususnya dan menjaga kepentingan pemegang-pemegang saham amnya. Seseorang pengarah berhak mengetahui apa yang berlaku dalam syarikatnya*. Pengetahuan boleh didapati melalui dokumen-dokumen syarikat seperti rekod akaun dan rekod-rekod yang lain. *Kewujudan perkataan 'rekod-rekod lain' dalam peruntukan s 167(3) digubal khusus supaya tanggungjawab pengarah dapat dilaksanakan dengan menyeluruh. Ia merangkumi apa-apa rekod yang berada dalam pegangan syarikat.* Untuk menjaga kepentingan syarikat, peruntukan tersebut memperuntukkan bahawa dokumen syarikathanya untuk kegunaan pengarah sahaja dan bukan untuk orang lain. Hak akses kepada dokumen syarikat gugur apabila seorang pengarah tidak lagi memegang jawatan pengarah (lihat *Haw Par Bros (Pte) Ltd v Dato Aw Kaw* [1973] 2 MLJ 169). *Ini adalah hasrat tersirat penggubal undang-undang bagi menghindar penyelewengan terjadi dengan sewenang-wenangnya dalam sesebuah syarikat*. (Emphasis added.)

[23] The scope of inspection is very wide as the express wordings of s 245 of

the CA 2016 contemplates that the power is available in respect of 'the accounting and other records' that will 'sufficiently explain the transactions and financial position of the company and enable true and fair profit and loss accounts and balance sheets and any documents required to be attached thereto to be prepared'. In *Dato' Seri Timor Shah*, the court held at [38] that s 245 encompasses 'all information pertaining to the company which every director, in his management of the company must be privy to if not familiar with. *This could potentially be everything in the records of the compan*y ...'. That the scope of inspection is wide is also fortified in *Paul Nicholson* where at pp 360–361, the court held that a director is entitled to know everything.

COURT'S FINDINGS

First plaintiff's right of inspection

[24] I next turn to deal with whether the defendant company had in resisting the first plaintiff's right of inspection shown 'clear proof', and satisfied the court 'affirmatively' that the grant of the right of inspection would be for a purpose detrimental to the interests of the company.

[25] Bearing at the forefront of the mind that the right of a director to inspect documents is almost absolute, the onus and burden is put squarely on the company to show why it is denying inspection to a director. In the absence of clear proof to the contrary, it will be assumed that he will exercise the right of inspection for the benefit of the company: *Molomby v Whitehead & Australian Broadcasting Corp* (1985) 63 ALR 282, *Edman v Ross* (1922) 22 SR (NSW) 351. On the facts of this case, I am of the respectful view that the company has not shown 'clear proof' and satisfied the court 'affirmatively' that the grant of the right of inspection would be for a purpose detrimental to the interests of the company. I am not persuaded that there is a 'real ground' that the right would be abused and that substantial harm would be caused to the company if inspection is allowed. My reasons follow.

Failure to disclose interest in GRE

[26] This court finds this complaint unsustainable:

(a) firstly, the court notes that the company's representatives had on 9 July 2019 visited GRE's factory in Senai Johor and met GRE's representatives, including the first plaintiff during which GRE's production plan and capacity, GRE's production forecast for 2020 and packaging of tea capsules were discussed. The fact that the aforesaid factory visit took place on 9 July 2019 in the presence of the parties mentioned above is an agreed fact; after which the defendant through its subsidiaries placed various orders Arissto Tea Capsules with GRE;

(b) after a meeting which took place with AmInvestment on 9 October 2020 for the purpose of the intended IPO attended by the company's directors including LCH, and representatives of the second plaintiff through CH Liu and Chong Chin Siong (respectively, director and chief financial officer of the second plaintiff), LCH messaged CH Lui by WhatsApp on the related party transaction between GRE and Arissto requiring AmInvestment's view, produced as exh 'BKL34' in the plaintiffs' AIR in encl 7 which shows the fact of the first plaintiff's interest was raised, and/or brought up during the meeting with AmInvestment on 9 October 2020;

(c) the fact of the meeting with AmInvestment and the Whatsapp message sent are agreed facts — both tend to show the company knew since 2019 of the first plaintiff's interest in GRE;

(d) added to that:

(i) when the second plaintiff's previous solicitors demanded by letter dated 15 April 2021 unhindered full access to records, the company's response of 21 April 2021 acknowledged the right of the second plaintiff's nominee on the board (the first plaintiff) to access, and further stated it was willing to provide full cooperation. Yet, the company did not afford access; and

(ii) the defendant only raised the first plaintiff's purported failure to fully disclose his interest in GRE as an issue for the first time in its solicitors' letter of 7 December 2021 but the plaintiffs' solicitors' response of 14 December 2021 which expressly stated that it was at all material times known to the company that the first plaintiff has a direct interest in GRE, there was no reply nor response from the defendant to deny what was stated in the plaintiffs' solicitors' letter.

(e) from the events that had occurred, I therefore agree with Mr Sivaneindiren's argument that the alleged 'recently discovered' first plaintiff's interest in GRE proffered as an excuse to deny access, is an ill-conceived after thought:

(i) the company's 'failure to raise issue at the earliest opportunity was an afterthought and machinations of a desperate litigant trying every trick in the book to escape judgment being entered against him' — *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283; [1995] 4 CLJ 155 (CA);

(ii) a formal declaration of a director's interest through a board meeting is not required if parties have knowledge of the interest:

(1) in *Genisys Intergrated Engineers Pte Ltd v UEM Genisys Sdn Bhd & Ors* [2008] 6 MLJ 237, the Court of Appeal held that s 131 of the then CA 1965 does not require a formal declaration of director's interest at a

meeting and neither does the section require a disclosure of relevant facts to persons wholly aware of them;

(2) in *Tneu Beh v Tanjong Kelapa Sawit Sdn Bhd & Ors and another action* [1994] MLJU 366; [1995] 1 CLJ 741, it was held that where all the directors know about the interest of a director in a contract when they executed a resolution, there was no necessity for a formal declaration at a board meeting; and

(3) in *Tan Bok Seong @ Tan Leong Tian v Sin Bee Seng & Co (Port Weld) Sdn Bhd & Ors* [1995] MLJU 384; [1995] 4 CLJ 795, the court, inter alia, held that if the second defendant knew about the agreement the company should likewise be said to have the necessary knowledge of that agreement. The court also held that the negotiations between the plaintiff and the second defendant which culminated in the signing of the agreement should reasonably be construed as sufficient declaration of the plaintiff's interest in the agreement.

(f) not only that. I am in accord with the view that it is also not the duty of this court to assiduously examine the disputed affidavit evidence pertaining to this complaint. In this regard, I refer to *Kwan Teck Hian* at [75] which followed the noteworthy observation of Kan Ting Chu JC in *Welch & Anor v Britania Industries Pte Ltd* [1993] 1 SLR 673:

> It is not for the court at the hearing of an application (to inspect accounts and records) to go into the disputes between the contending parties and I will not deal with the charges and counter charges of the plaintiffs and Rajen Pillai (defendant), beyond saying that they show clearly that the plaintiffs were concerned over the company's account before they made their application.

(g) I find the allegation at para 13(c) of the company's affidavit in reply in encl 6 that the first plaintiff 'have (sic) likely acted in direct conflict with the defendant's interests and in breach of his duties as the director of the defendant 'does not amount to clear proof as required by case law to deny the unbridled rights of inspection. Likewise the company's contention that if the inspection sought is allowed, the first plaintiff or GRE will have access to documents which 'may contain confidential or proprietary information';

(h) in my respectful view, the first plaintiff 's concerns over the accounts of the company as adverted to in para 10(b) and 10(c)(v) above are not noisome and to be swatted away for nuisance value particularly when non-filing of accounts within time and non-keeping of proper records of the company respectively attract penal consequences to the first plaintiff under ss 259 and 245(9) of the CA 2016;

(i) on suspicions affording all the more reason for inspection, besides *Kwan*

Teck Hian, two other cases underscore the point:

(i) Rogers VP, writing the lead judgment in Hong Kong's Court of Appeal in the case *Law Wai Duen & Anor v Boldwin Construction Co Ltd & Ors* [2001] 4 HKC 403; [2001] 3 HKLRD 430 stated:

> [12] ... If a director has cause to be suspicious, or reasonably believes there is such cause, then the director may incur liability if he does not satisfy himself in relation to all matters relating to the company's affairs. More importantly, even if a director does rely upon other directors or company officials in the conduct of the company's affairs, he must, at all times, be at liberty to satisfy himself as to any matter in relation to the company's business.

(ii) Kan Ting Chu JC's pronouncement in *Welch & Anor v Britania Industries Pte Ltd* at p 681/2 is apposite:

> ... *When there is suspicion and lack of co-operation, a director is all the more entitled, perhaps even obliged, to inspect company accounts to protect the interests of the company and its shareholders. The right is not only to be exercised or the duty imposed when there is harmony within the company.* (Emphasis added.)

The defendant's allegation of counterfeit 'Erissto' coffee capsule

[27] As for the defendant's allegation of counterfeit 'Erissto' coffee capsule being sold in the market and:

(a) that such counterfeit Erissto Coffee Capsules 'were likely produced from the same mould used by GRE to produce the company's Arissto Capsule'; and

(b) that GRE and/or the first plaintiff 'are likely involved in the production and sale of the counterfeit capsules in the market and have likely acted in direct conflict with the company's interests and in breach of his duties as the director of the defendant company'.

when examined, do not in this court's respectful view, amount to 'clear proof' nor satisfy the court 'affirmatively' of any involvement on the part of the plaintiffs and/or GRE in selling the alleged counterfeit coffee capsules. It is readily apparent that there is much vagueness and uncertainty in the allegations as borne out by the very wordings employed by the defendant in advancing such complaints. I find these allegations are merely conjectural in nature.

[28] The company's contention of the leak of trade secrets remains a bald allegation. So too the allegation that such leak of trade secrets 'may and/or have put' the company at a disadvantage and/or in a precarious position is equally speculative and unsubstantiated.

[29] It is this court's opinion that these allegations without more, strained

credulity, and do not satisfy the court affirmatively of ulterior motive to defeat the first plaintiff's absolute right of access.

[30] Further , I am also in accord with the view in *Kwan Teck Hian* at [87] which followed the High Court in *Mageswary a/p Kannaiah v Vithylingam a/l Mayandy & Perniagaan Kilat Jaya Sdn Bhd* [2009] MLJU 202; [2009] 9 CLJ 40 which held that 'The fact that the plaintiff had set out a rival company does not ipso facto indicate that she would be using the accounts and books for the ulterior purpose of benefiting the company that she had set up'.

[31] In the instant case, the plaintiffs have denied the company's accusations of the plaintiffs' involvement in counterfeit coffee capsules and leak of trade secrets. I have pondered over the fact that, if there was any ring of truth or credibility in the company's accusations, it is both troubling and noteworthy that there was no suit filed against the first plaintiff and or second plaintiff; nor any steps taken to remove the first plaintiff as a director of the company. This aspect is important. In this regard, I am guided by the view of Slade J in *Conway and others v Petronius Clothing Co Ltd and others* [1978] 1 All ER 185 where he stated that 'in the case where there is no reason to suppose that the director is about to be removed from office, the discretion to withhold an order for inspection will be very sparingly exercised'.

Non-refund of the sum of RM2m and failure to make good the said cheque RM57,600

[32] Having regard to the scope and intent of s 245 of the CA 2016, I find the existing issues or dispute between GRE and the company pertaining to the alleged non-refund of the RM2m and the failure to make good the said cheque RM57,600 are of no relevance, nor warrant an order refusing inspection. This dispute is more appropriately resolved in another forum.

Does the director's right of inspection of company's documents extend to its subsidiaries or former subsidiaries which are not named in the OS?

[33] From the audited accounts of the company for financial year end ('FYE') 2016 and FYE from 1 January 2018 to 30 June 2019, it is evident that:

(a) NHHK ceased to be a subsidiary when it applied for deregistration on 10 October 2017; and

(b) WGL and SDTCL ceased to be the company's subsidiaries on 2 January 2018 when the company disposed of its entire interests in WGL and SDTCL.

[34] Relying on the doctrine of 'separate legal entities', the company contended that inspection should not be accorded to documents and information relating to: (a) subsidiaries not named as a party in the OS; and (b) NHHK, WGL and SDTCL as these three companies are no longer the subsidiaries of the company.

[35] I find these defendant's contentions do not hold water:

(a) firstly, the scope of s 245 of the CA 2016 is very wide as discussed in paras [22] and [23] above, it embraces potentially everything in the records of the company; and

(b) second, I accept Mr Sivaneindiren's submission on this point. Learned counsel drew this court's attention to:

(i) the Singapore Court of Appeal's decision in *Mukherjee Amitava v Dystar Global Holdings (Singapore) Pte Ltd and others* [2018] 2 SLR 1054 ('Mukherjee Amitava') where the application there was made pursuant to s 199 of the Singapore Companies Act which is in pari materia to s 245 of the CA 2016. The Singapore Court of Appeal after considering whether the right of inspection extended to documents belonging to subsidiaries and related companies, allowed the appellant to inspect documents and records in the possession of the company even if they belonged to the subsidiaries of the company to the extent that those documents and records can be shown to be relevant and necessary to explain the transactions and financial position of the company and enable true and fair financial statements to be prepared;

(ii) the Singapore Court of Appeal found support from the Hong Kong High Court's decision in *Tom Ming Chou v Pan Ping-Hu Antony & Ors* [2009] HKCU 1660; [2009] HKCFI 1008 and held at [41] that what matters is whether the accounting documents in question are necessary to give a true and fair view of the state of the company's affairs;

(iii) in *Tom Ming Chou*, the Hong Kong High Court allowed all books of accounts, management accounts, working papers, bank statements, cheque stubs, contracts, instruments of transfer, statutory records and invoices belonging to the company and its subsidiary, ie Shanghai Yifeng Culture Entertainment Centre Co Ltd. The Hong Kong Court held at [2], [24], [26] and [28] that the fact that some of the documents sought belong to the subsidiary is immaterial;

(c) third, having found no local authority dealing on point with whether the scope of s 245 of the CA 2016 on inspection of accounting and other records cover 'subsidiary companies', I will follow the approach of the Singapore Court of Appeal that the right of inspection of a company's records will include that of its subsidiaries, if the accounting documents

in question are necessary to give a true and fair view of the state of the company's affairs;

(d) fourth, I am fortified in my view that to understand the financial position of a company, one must take into account that the scope of s 245 of the CA 2016 has a nexus with ss 249 and 250 of the CA 2016 and necessarily encompass the company's subsidiaries. These two sections expressly prescribe that the annual consolidated financial statements for a financial year of a company shall include all the subsidiaries of a company. The two sections read as follows:

> 249 General requirements for financial statements
>
> (1) The annual financial statements for a financial year shall give a true and fair view of the financial position as at the end of the financial year and the financial performance for the financial year of the company.
>
> (2) The annual consolidated financial statements for a financial year shall —
>
> (e) give a true and fair view of the financial position of the company and *all its subsidiaries* which are dealt within the consolidated financial statements as a whole at the end of the financial year; and
>
> (f) give a true and fair view of the financial position of the company and *all its subsidiaries* which are dealt within the consolidated financial statements as a whole at the end of the financial year; and
>
> (3) For the purposes of this Division, the Registrar may require additional information as he deems fit apart from the information required by the authorities referred to in section 26D of the Financial Reporting Act 1997 in the financial statements of persons reporting to such authorities as referred to in subsection 244(6).
>
> (4) Not withstanding any relevant provisions of the applicable approved accounting standards, the financial statements shall contain, in the notes to the statements, the information as the Registrar may determine and may include but not limited to the following:
>
> (a) the directors' remuneration;
>
> (b) the directors' retirement benefits;
>
> (c) compensation to directors for loss of office;
>
> (d) loans, quasi-loans and other dealings in favour of directors;
>
> (e) the total of the amount paid to or receivable by the auditors as remuneration for their services as auditors, inclusive of all fees, percentages or other payments or consideration given by or from the company or by or from *any subsidiary of the company*.
>
> (5) ...
>
> (6) ...

(7) ...

(8) ...

250 Subsidiaries to be included in consolidated financial statements

(1) The consolidated financial statements for a financial year shall include all the subsidiaries of a company.

(2) Where the consolidated financial statements do not deal with a *subsidiary of a company*, the directors shall disclose by way of a note on the financial statements the reason for not causing the financial statements for such one or more *subsidiaries* to be consolidated.

(3) In the case of a *subsidiary incorporated in a country outside Malaysia*, whether it has or has not established a place of business in Malaysia, which country has been declared by the Minister by notification published in the *Gazette* to be a country to which this section applies, it shall be sufficient if the separate profit and loss account or balance sheet, as the case may require, of the *subsidiary* is in such form and is so reported upon by auditors and contains such particulars and includes such documents, if any, as the company is required to make out and lay before the company in a general meeting in accordance with the law for the time being applicable to the company in the place where it is incorporated.

(4) For the purposes of subsection (1), the holding company shall have the power to request all relevant information from its *subsidiaries* to secure compliance under this section.

(5) Any director who fails to take all reasonable steps to secure compliance under subsection (1) commits an offence.

(a) fifth, the OS made plain that the plaintiffs are seeking the accounting and other records of the company including NHHK, WGL and SDTCL for the financial years 2016 to 2021, which include the years when NHHL, WGL and SDTCL were still subsidiaries of the company; and

(b) sixth, in *Mukherjee Amitava* and in *Tom Ming Chou*, the subsidiaries were not named as a party to the action, yet inspection was allowed.

[36] Despite that the audited accounts of the defendant company for financial years ending 30 June 2016, 31 December 2017, 30 June 2019, and the draft audited accounts for financial year ending 30 June 2020 have been rendered to the plaintiffs, I accept the first plaintiff's argument that being a director of the companies, he still has a duty to ensure the accuracy and correctness of the financial statements. The reason is not difficult to understand for in *Soo Boon Siong @ Saw Boon Siong v Saw Fatt Seong andSoo Hock Seang (as estate representative Soo Boon Kooi@ Saw Boon Kooy (deceased)) & Ors* [2008] 1 MLJ 27; [2008] 1 CLJ 365, the Court of Appeal referred to *Petlad Turkey Red Dye Works Ltd v Dyes & Chemical Workers' Union, Petlad & Anor* [1960] 2 SCR

906, an Indian Supreme Court decision, which held:

> The mere fact that the statements were made can never be taken as proving that the statements were correct. ... There is no reason why an exception should be made in the case of balance sheets prepared by companies for themselves. It has to be borne in mind that in many cases the directors of the companies may feel inclined to make incorrect statements in these balance sheets for ulterior purposes. While that is no reason to suspect every statement made in these balance sheets, the position is clear that we cannot presume the statements made therein to be always correct. The burden is on the party who asserts statement to be correct to prove the same by relevant and acceptable evidence.

[37] The above *Petlad* decision was cited with approval by the Supreme Court in *KPM Khidmat Sendirian Bhd v Tey Kim Suie* [1994] 2 MLJ 627.

The second plaintiff's rights to documents

[38] I find that under cl 7.8.2 of the SA, the defendant company has a contractual obligation to provide the audited financial statements to the second plaintiff and under cl 7.8.1, shall include those of the company's subsidiaries, and shall be provided on a consolidated basis.

[39] I hold the view that there is no acceptable reason advanced by the company to renege on its contractual obligations. Indeed, it is the court's duty to uphold bargains and not strike them down willy-nilly *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327; [1997] 1 CLJ 625. I am not swayed by the defendant's learned counsel's argument that the right to the company and its subsidiaries' documents are subject to the non-competition clause housed in cl 20 of the SA based only on the mere conjecture that the first plaintiff '*might use* the information, including confidential business or proprietary information to injure or cause loss to the defendant company'.

[40] Parties are bound by the terms of the agreement that they had entered into. There is no lack of authorities on this aspect of contract law, chief of which is the Federal Court decision in *Michael C Solle v United Malayan Banking Corporation* [1986] 1 MLJ 45 which pronounced as follows:

> The principles of construction to be applied to the undertaking are similar to those applied to an ordinary contract. The intentions of the parties are to be gathered from the language used. They are presumed to have intended what they said. The common and universal principle is that an agreement ought to receive that construction which its language will admit, which will best effectuate the intention of the parties, to be collected from the whole agreement.

[41] Bearing in mind that the second plaintiff has invested RM60m into the company, sans any vitiating factor, its contractual rights to documents as set out in the SA ought to be enforced, rather than be rendered illusory as pithily stated in *OCBC Bank (Malaysia) Bhd v Lim Hock Kok & Anor (kedua-dua berniaga sebagai rakan kongsi di dalam firma 'Ictinus Home and Building Constructions and Designs')* [2017] MLJU 798; [2017] 9 CLJ 454 by Idrus Harun JCA (as he then was) as follows:

> [14] ... *it is imperative that contractual rights are recognized and enforced. It is not for the courts to rewrite a contract or bargain made by the parties. For there to be commercial efficacy and certainty, contractual terms agreed to by the parties should be enforced*. Otherwise, it would result in chaos and commercial activities would grind to a halt if parties are not entitled to determine for themselves the rights and obligations to be given or assumed under a contract. We should emphasize that this is a logical and acceptable construction which parties ought to bring to bear upon a contract which they have agreed to enter into upon which terms they agree to be bound. (Emphasis added).

Director's right to inspection includes right to a copy of the documents

[42] As for a copy of the documents sought for in Annexure B of the OS, I hold the view that the plaintiffs are entitled to a copy for reasons as follows. Section 245 of the CA 2016 is to be read with s 48 where s 48(3) provides:

> (3) The person who is entitled under this Act to inspect the documents and records referred to in subsection (1) shall be allowed to make copies or take extracts from the documents and records.

[43] In *Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn* Mohd Nazlan J (now JCA) cited with approval *Edman v Ross* and concluded in the following manner:

> *Inspection right includes right to be given copies of documents*
>
> [33] So, does the inspection right encompass the right to ask for copies of the documents? This has been answered in *Edman v Ross* (1922) 22 SR (NSW) 351 in the affirmative. This Australian case is a leading authority on the director's right in common law to inspect and take copies of the accounting records which in addition may be exercised personally or through his agent, such as his accountant. It was held most instructively as follows:
>
> > A director 's right to inspect and take copies of documents belonging to this company is, I think, clear.
> >
> > In *Burn v The London and south Wales Coal company and the Risca Investment company (7 TLR 118)*, North J, pointed out that he had this right and not at meetings only. He pointed out the inconvenience that would arise if it were otherwise, and the said that the very object of the director having access to such documents was that he might be prepared to act at meetings. He observed also

that it was necessary that confidence should be reposed in a director, that he would use his knowledge for the benefit of the company, and that if a company had not confidence in its directors its proper course was to remove them.

The right to inspect documents and, if necessary, to take copies of them is essential to the proper performance of a director's duties, and, though I am not prepared to say that the court might not restrain him in the exercise of this right if satisfied affirmatively that his intention was to abuse the confidence reposed in him and materially to injure the company, it is true nevertheless, that is exercise is, generally speaking, not a matter of discretion with the court and that he cannot be called upon to furnish his reasons before being allowed to exercise it. In the absence of clear proof to the contrary the Court must assume that he will exercise it for the benefit of his company.

[34] *Does the same position obtain in this country? The short answer is in the positive. I cannot but hold that the right for copies is integral to and intertwined with the very concept of inspection right itself*. Unlike the scope of shareholder's inspection rights, which is more restricted, it is a correct statement of law that in this country the right of a company director to inspect the corporate books and records and access all company information is virtually absolute. This is not difficult to appreciate. As directors are tasked with the responsibility of managing the business and affairs of the company, it is nothing less than axiomatic that the individual director cannot truly make his full contribution to the management of the corporate business unless he or she is given access to the corporation's books and records. (Emphasis added)

[44] His Lordship Mohd Nazlan J (now JCA) then crisply stated at [44] that necessarily implicit in the essence of the right to inspect, is the right to make copies of the documents so inspected. Without the latter, the exercise of the right of inspection would be impaired and rendered not entirely effective.

[45] The same passage in *Edman v Ross* on a director's right to inspect and take copies of documents belonging to the company was also cited with approval by Nallini Pathmanathan JC (now FCJ) in *Mirza Mohamed Tariq Beg bin Mirza HH Beg v Perunding Pakarmedia Sdn Bhd* [2009] 10 CLJ 273.

[46] On the entirety of the evidence before the court, I am not persuaded by the defendant that allowing inspection is inimical to the interests of the company. I regret that I do not see any 'real ground' that the right of inspection would be abused and that substantial harm would be caused to the company thereby. I will emphasize the point that the possibility of abuse or misuse of the right (of inspection) does not in law afford any ground for its denial or restriction. In this regard, Mohd Nazlan J (now JCA) emphatically stated in *Dato' Seri Timor Shah*:

[93] ... *The mere possibility of abuse or misuse of the right does not afford any ground for its denial or restriction*. A director retains this right of inspection (inclusive of the right to be supplied with copies of documents so inspected), despite mere

A allegations that he is hostile, adverse or a competitor of the corporation, for as long as he remains a director of the company.

[94] Without clear evidence to such effect, attempts to restrict such rights will not withstand judicial scrutiny. Otherwise, refusal of inspection and taking of copies could lead to a corresponding dilution of accountability on the part of the directors, B resulting in an unwarranted and dangerous inroad into the sacrosanct principle of d irector's duty of management in company law. (Emphasis added.)

C **[47]** The obligations to keep records and making them available for inspection by directors is underscored by the criminal sanctions spelt out in s 245(9) of the CA 2016 when there is no 'real ground' to deny inspection.

D **[48]** In my view, a director would be put in an invidious position of risk of liability for breach of statutory duties when the court folds its arms and refuse to enforce the director's right of inspection by the exercise of which he could then take steps to avoid liability for breach of those duties, particularly, when the defendant has not discharged the onus of establishing that the right of inspection will be exercised for improper purpose.

E **[49]** What is then left, is the appointment of the auditor. A director can exercise his right of inspection through an approved auditor. I hold that pursuant to s 245(8) of the CA 2016, the first plaintiff is entitled to appoint his auditor Andrew Heng to assist him in his inspection of the company's records. In any event, the defendant has not objected against Mr Heng's appointment in F the current application.

[50] In conclusion, for all the reasons given, it is abundantly clear to me that the company's concerns understood holistically, reveal no real basis to deny inspection. I thus reject the company's objections to inspection by the G plaintiffs. This court instead finds that the plaintiffs have proven their case on a balance of probabilities.

[51] The application in the OS is as such allowed with costs.

H **[52]** I have not addressed here each and every single argument and case authority submitted by the parties to avoid a lengthy judgment. No discourtesy was intended.

Originating summons allowed with costs.

I

Reported by Dzulqarnain Ab Fatar